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IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,

Petitioners/Applicants,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, *et al.*,

Respondents.

No. 16A1191

DONALD J. TRUMP, *et al.*,

Applicants,

v.

STATE OF HAWAII, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND APPLICATIONS FOR STAY TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

MOTION FOR LEAVE TO FILE AND BRIEF OF T.A. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND THEIR OPPOSITIONS TO STAYS

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MOTION FOR LEAVE TO FILE

T.A. respectfully moves for leave to file a brief as amicus curiae in support of Respondents and their oppositions to the stay applications. The parties have consented to the filing of the enclosed amicus brief.

Amicus respectfully requests that the Court consider the arguments herein and in the enclosed amicus brief demonstrating the absence of likely irreparable harm in opposition to Applicants' stay applications in *Trump v. Hawaii*, No. 16A1191 (S. Ct. filed June 1, 2017) and *Trump v. International Refugee Assistance Project*, No. 16A1190 (S. Ct. filed June 1, 2017). The attached amicus brief demonstrates the absence of likely irreparable harm on multiple grounds. These include that by the express terms of the current executive order, the travel ban expires on June 14, 2017, and the refugee ban expires on July 14, 2017, and President Trump's official statements that his Administration already has been engaging in "extreme vetting" *without* the bans. Because the lack of a likelihood of irreparable harm is a non-merits basis to deny a stay, Amicus's arguments "may be of considerable help to the Court." Sup. Ct. R. 37.1.

1. Statement Of Movant's Interest.

President Donald Trump signed Executive Order 13,780, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "Amended Order"), on March 6, 2017. T.A.* is a Muslim and United

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* The brief uses initials, rather than T.A.'s full name, to reduce the risk of potential reprisals to T.A. or his family members. This Court has permitted even parties to use pseudonyms and initials in similar circumstances. *See, e.g.*, *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290 (2000).

States citizen who was raised in Yemen. T.A.'s father and many members of T.A.'s extended family hold Yemeni passports and reside abroad. T.A. would be affected by the Amended Order. Under the Amended Order, much of T.A.'s extended family—including his father, aunts, uncles, and cousins—would be barred from entering the United States.

2. Statement Regarding Brief Form And Timing.

Given the expedited briefing of the stay applications, Amicus respectfully requests leave to file the enclosed brief supporting Respondents and their opposition to Petitioners' stay applications without 10 days' advance notice to the parties of intent to file. *See* Sup. Ct. R. 37.2(a). The petition for a writ of certiorari and applications for stay and for expedited briefing and consideration in this Court were filed on June 1, 2017. On June 2, 2017, this Court ordered a response to these filings by June 12, 2017. By June 3, 2017, counsel for T.A. had given notice to all parties of the intent to file an amicus brief in opposition to the applications for stays. All parties gave their consent by June 4, 2017. The above justifies the request to file the enclosed amicus brief supporting Respondents and their oppositions to the stay applications without 10 days' advance notice to the parties of intent to file.

CONCLUSION

The Court should grant Amicus Curiae leave to file the enclosed brief in support of Respondents and their oppositions to the stay applications.

DATED: June 9, 2017.

Respectfully submitted,

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OTHER AUTHORITIES

Aric Jenkins, *Sean Spicer Says President Trump Considers His Tweets 'Official' White House Statements*, TIME (Jun. 6, 2017).....14

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Karoun Demirjian & Jerry Markon, *Obama administration rolls out new visa waiver program rules in wake of terror attacks*, WASH. POST (Jan. 21, 2016).....8

Martin Robinson, *Second London Bridge terrorist was a Moroccan-Libyan pastry chef living in Dublin with an Irish ID*, DAILYMAIL.COM (Jun. 5, 2017 10:44 a.m. EDT, updated Jun. 5, 2017 4:52 p.m. EDT) 18

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Paul Cruickshank, *Who was London attacker Khuram Butt?*, CNN (Jun. 6, 2017 2:42 a.m. ET) 18

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STATEMENT OF INTEREST

Amicus files this brief to oppose both Applications for Stay in these cases. This brief focuses on the Applications' failure to make any showing of a likelihood of irreparable harm to our national security absent a stay. Among other reasons, there is no irreparable harm because, under the current executive order's own express terms, the travel ban expires June 14, 2017, the refugee ban expires July 14, 2017, and this Administration already has undertaken "EXTREME VETTING" *without* the bans. *See infra*, at 9-14. The absence of likely irreparable harm provides a dispositive, non-merits reason to deny the Applications for Stay.

Section 2(c) of President Trump's Amended Executive Order, dated March 6, 2017 (the "Amended Order"), bars entry by nationals of six Muslim-majority countries. T.A.[1] is a United States citizen who was raised in Yemen. T.A. is a Muslim. T.A.'s father and many members of T.A.'s extended family hold Yemeni passports and reside abroad. They and many others with plans to visit this country for school, medical, family, tourist, or other legitimate reasons would *immediately* be barred from entering the United States—causing havoc—if the stay applications were granted. Although banned persons "could" apply for

1. No counsel for any party authored this brief in whole or in part, and no person or entity other than Amicus made a monetary contribution to its preparation or submission. This brief is filed with the consent of all parties.

"[c]ase by case" waivers under Section 3 of the Amended Order, Section 16(c) provides that nothing in the Amended Order provides any "enforceable" right, "substantive or procedural." 82 Fed. Reg. 13209 (Amended Order) at § 16(c). The Amended Order does not even provide for any *un*enforceable opportunity to be heard as to any purported reason to deny entry, any timing for or notification of a denial, much less any reason, or any ability to challenge a denial.

BACKGROUND

On March 15, 2017, the Maryland District Court issued a preliminary injunction barring enforcement of Section 2(c) of the Amended Order. *See Int'l Refugee Assistance Project v. Trump*, No. TDC 17 0361, 2017 WL 1018235, at *18 ("*IRAP I*") (D. Md. Mar. 15, 2017), ECF No. 149. The Maryland District Court found that "the record provides strong indications that the national security purpose is not the primary purpose for the travel ban." *Id.* at *15. The Maryland District Court further found that the Government had "not shown, or even asserted that national security cannot be maintained without an unprecedented six-country travel ban." *Id.* at *17. The Fourth Circuit substantially affirmed the decision of the Maryland District Court and demonstrated at length that "any national security justification for EO-2 . . . was offered as more of a 'litigating position' than as the actual purpose of EO-2." *See Int'l Refugee Assistance Project v. Trump*, No. 17-1351, 2017 WL 2273306, at *18 ("*IRAP II*") (4th Cir. May 25, 2017), ECF No. 295.

On March 29, 2017, the Hawaii District Court issued a preliminary injunction barring enforcement of Sections

2 and 6 of the Amended Order. The Hawaii District Court found that "the record here" is "full of religious animus, invective and *obvious pretext*." *Hawaii v. Trump*, CV. No. 17-00050 DKW-KSC, 2017 WL 1167383, at *6 ("*Hawaii I*") (D. Haw. Mar. 29, 2017), ECF No. 270 (emphasis added). The Ninth Circuit is currently reviewing *Hawaii I* in *Hawaii v. Trump*, No. 17-15589 ("*Hawaii II*") (9th Cir. Apr. 20, 2017).

ARGUMENT

This brief focuses on one of many fully sufficient grounds to deny the Applications for Stay. The Applications have failed to carry the Applicants' burden to show likely irreparable harm. Not only do the Amended Order's travel and refugee bans expire soon by the Amended Order's own terms, but President Trump himself admits that his Administration has been engaging in "extreme vetting" without the travel and refugee bans. Nothing in the Applications even asserts that this Administration's "extreme vetting" would somehow be inadequate for nationals of the six countries or refugees during the brief period if there were any review by this Court.

I. Lack Of Likely Irreparable Injury Provides A Dispositive, Non-Merits Ground To Deny A Stay.

The Maryland District Court found that the Applicants had "not shown, or even asserted" that national security depended upon the Amended Order's travel ban. *IRAP I*, 2017 WL 1018235 at *17. The Maryland District Court also found that the United States was "not directly harmed" by the injunction preventing the enforcement of the Amended Order. *Id.* Likewise, the Hawaii District

Court found that the Government's assertion that national security was the basis for the travel and refugee bans was an "obvious pretext." *Hawaii I*, 2017 WL 1167383 at *17. These findings of a lack of harm may be set aside only for an abuse of discretion. *Cf. Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004) ("This Court, like other appellate courts, has always applied the abuse of discretion standard on review of a preliminary injunction.").

The requirements for a stay are conjunctive. The third requirement is "a *likelihood* that irreparable harm [*will*] *result* from the denial of a stay." *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J.) (internal quotation marks and citations omitted). Here, the Applicants' failure to show that it is likely that irreparable harm will result provides a dispositive basis for this Court to deny a stay without addressing the merits. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008) (movant for equitable relief is required to show that he "is likely to suffer irreparable harm before a decision on the merits can be rendered") (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1, p. 139 (2d ed. 1995)). Indeed, because denying a stay for lack of irreparable harm is not a merits decision, such a non-merits decision also need not decide "whether the parties present an Article III case or controversy." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007).

II. An Injunction Against Executive Action Is Not *Per Se* Irreparable Harm.

The Applicants' principal argument for irreparable harm is that such harm occurs "*whenever* . . . executive" officials are "enjoined in their official conduct." Application,

at 34 (emphasis added).[2] This proposition is breathtaking, unprecedented, and wrong.

This Court has held that irreparable harm is traditionally determined based on the facts and circumstances of each case. In *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), this Court unanimously rejected a rule that "an injunction automatically follows" when a patent is infringed regardless of the facts of the specific case. *Id.* at 392-93; *see also id.* at 395-96 (Kennedy, J., joined by Stevens, Souter, and Breyer, J.) (explaining that irreparable harm is based on "the circumstances of a case" "without resort to categorical rules"). This Court held that "'a major departure from the tradition of equity practice'"—including that a case-specific irreparable harm must be shown—"'should not be lightly implied.'" *Id.* at 391 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982)). The Court refused to do so when "[n]othing in the [pertinent text] indicates . . . such a departure." *Id.* at 391-92.

Here, the Applicants cite 28 U.S.C. §§ 1651(a) and 2101(f), and Sup. Ct. R. 23, as the pertinent texts concerning a stay. Application at 1. Although stays of injunctions against executive action are often sought under these provisions, nothing in them indicates a departure for such cases from the traditional requirement of irreparable harm based on the facts of the specific case. To the contrary, 28 U.S.C. § 1651(a) refers to issuing writs "agreeable to the usages and principles of law." As

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2. All citations to the "Application" are to Application No. 16A1190 seeking a stay of *IRAP II*. Similar arguments are made in Application No. 16A1191 seeking a stay of *Hawaii I*.

eBay demonstrates, one of those "usages and principles" is requiring irreparable harm arising from facts in the particular case as a condition for equitable relief. *See eBay*, 547 U.S. at 391-94.

The Applicants misplace their reliance on the in-chambers opinions in *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox. Co.*, 434 U.S. 1345 (1977) (Rehnquist, J.), and *Maryland v. King*, 133 S. Ct. at 1. In both of those cases, unlike here, there were substantial factual showings of likely harm and indisputable statutory authorization for the action enjoined by the lower court. In *New Motor Vehicle*, a statute expressly precluded the establishment and relocation of automobile dealerships prior to investigation and examination by a state board. *New Motor Vehicle Bd. of Cal.*, 434 U.S. at 1345-46. Then-Justice Rehnquist's stay was based on an affidavit from the executive secretary of the state board "that in the first 44 days following the issuance of the District Court's injunction," 99 dealerships had been established or relocated "without . . . any scrutiny by the State." *Id.* at 1351. Only after that finding of irreparable harm in the specific case did Justice Rehnquist add the dictum: "It *also* seems to me that any time a State is enjoined by a court from effectuating *statutes* enacted by representatives of its people, it suffers a form of irreparable injury." *Id.* (emphasis added).

In *Maryland v. King*, the Chief Justice found "an ongoing and *concrete* harm to Maryland's law enforcement and public safety interests." 133 S. Ct. at 3 (emphasis added). Specifically, the enjoined statute expressly authorized collecting DNA "from individuals arrested for violent felonies" and had led to 58 criminal prosecutions

for serious crimes in three years. *Id.* Although *Maryland v. King* quoted the dictum from *New Motor Vehicle*, the holding of *Maryland v. King* was case-specific: "That Maryland may not employ a duly enacted statute to help prevent *these injuries* constitutes irreparable harm." *Id.* (emphasis added).

The travel ban cases are entirely unlike *New Motor Vehicle* and *Maryland v. King* for two reasons. First, executive orders pose fundamentally different risks and have less claim to presumed legitimacy than do statutes. A single executive's action has neither the majority votes from multiple elected representatives nor the pre-enactment public deliberations and compromise that are hallmarks of statutes. Concerns about executive actions are older than the word "tyranny." The word "tyranny" is derived from the Greek "tyrannos," which means a single "lord, master, sovereign, absolute ruler unlimited by law or constitution." ONLINE ETYMOLOGY DICTIONARY, http://bit.ly/2qYvsFi. Our founders were especially focused on executive tyranny, as the Declaration of Independence describes over two dozen wrongs by "the present King of Great Britain" in seeking "the establishment of an absolute Tyranny over these States." DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Second, the Amended Order's travel and refugee bans are unsupported by anything like the indisputable statutory authorizations in *New Motor Vehicle* and *Maryland v. King*. To the contrary, three judges of the Fourth Circuit demonstrated that the Amended Order violates multiple statutory provisions. *See IRAP II*, 2017 WL 2273306 at *29-32 (Keenan, J., joined by Thacker, J., concurring); *id.* at *34-47 (Wynn, J., concurring); *id.* at *51-54 (Thacker, J. concurring).

Indeed, the Amended Order's travel and refugee bans override specific Congressional decisions about when entry is barred based on concerns about terrorism. For example, in 2015, Congress addressed the potential terrorism issue in the specific context of travel by nationals of the six countries. The solution enacted by Congress, as implemented by the Department of Homeland Security ("DHS"), was to require visas for nationals of the six countries, Application at 5-6—*not* to ban travel. Under the solution chosen by Congress, nationals of the six countries "go through the full vetting of the *regular* visa process, which includes *an in-person interview at a U.S. embassy or consulate*." Karoun Demirjian & Jerry Markon, *Obama administration rolls out new visa waiver program rules in wake of terror attacks*, WASH. POST (Jan. 21, 2016), http://wapo.st/2sERVn1 (emphasis added); U.S. Customs and Border Protection, *Visa Waiver Program Improvement and Terrorist Travel Prevention Act Frequently Asked Questions* (Nov. 28, 2016), http://bit.ly/1Tz4wRn. Since such vetting began, the Applicants cite *no terrorist attack or attempted terrorist attack* in this country by any national of any of the six countries.

Congress also has provided in 8 U.S.C. § 1182(a)(3)(B) "specific criteria for determining terrorism-related inadmissibility." *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., joined by Alito, J., concurring). To hold that the Amended Order's blanket travel and refugee bans have statutory authority "would impermissibly render superfluous" the detailed and specific criteria in Section 1182(a)(3)(B). *IRAP II*, 2017 WL 2273306 at *41-44 (Wynn, J., concurring).

Accordingly, Sections 2 and 6 of the Amended Order constitute *executive* action that, at a minimum, raises serious questions of constitutional *and statutory* invalidity. These cases therefore bear no resemblance to the holdings or dictum in *New Motor Vehicle* and *Maryland v. King*.

III. The Applicants Did Not And Cannot Show Likely Irreparable Harm.

The Applicants must show likely "irreparable harm before a decision on the merits can be rendered" by this Court. *Winter*, 555 U.S. at 22. Applicants did not and cannot show this for three independent reasons.

First, there can be no such showing because the Amended Order's travel and refugee bans soon will expire by the Amended Order's own express terms. By the express terms of the Amended Order, the travel ban ends "90 days from *the effective date of this order*," the refugee ban ends "120 days after *the effective date of this order*," and *the* "Effective Date" of "[t]his order" is defined as "March 16, 2017." Amended Order §§ 2(c), 6(a), 14 (emphasis added). Because Sections 2(c) and 6(a) of the Amended Order expressly tie the expiration of each ban to a period running from "*the* effective date of this *order*," there is no basis for judicial rewriting of the order to create a different period tied to when those sections were not subject to an injunction. *Cf., e.g., Freytag v. Comm'r*, 501 U.S. 868, 902 (1991); ("[t]he definite article 'the' obviously narrows . . ."); *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) ("The consistent use of the definite article in reference to the custodian indicates that there is generally only one proper respondent . . . ."). The single effective date for the entire order is March 16, 2017.

Indeed, Sections 1, 4-5, and 7-13 of the Amended Order have been in operation since March 16, 2017. Under the plain meaning of the Amended Order, therefore, the travel ban expires June 14, 2017—90 days after March 16, 2017. Likewise, the Amended Order's refugee ban expires July 14, 2017—120 days after March 16, 2017. There cannot be likely irreparable harm because not one word of the Applications even purports to show any threat to national security if the travel ban remains enjoined for a few days through its expiration on June 14, 2017, and the refugee ban remains enjoined through its expiration on July 14, 2017.

Second, President Trump indicated on June 5, 2017 that he wants a new, "much tougher" order. *See* Donald J. Trump (@realDonaldTrump), TWITTER (Jun. 5, 2017 3:37 a.m.), http://bit.ly/2sJEOkN ("The Justice Dept. should ask for an expedited hearing of the watered down Travel Ban before the Supreme Court - *& seek much tougher version*!") (emphasis added). There can be no irreparable injury from the current injunctions of the Amended Order if the President plans a new order regardless of those injunctions. Indeed, the Applicants' attempt to obtain a ruling on the Amended Order while the President plans a new order constitutes a request for an advisory opinion in violation of Article III.

Third, in all events, there would be no likely irreparable harm even if (a) the Amended Order's expiration dates for the bans could somehow be judicially extended and (b) the Applicants were not seeking an advisory opinion. If this Court grants review, a decision would issue at most in a matter of months. *Cf. New York Times Co. v. United States*, 403 U.S. 713 (1971) (Pentagon Papers decision

issued four days after argument and five days after grant of certiorari). Applicants make no showing of any likely harm over any period, much less within a matter of months.

Nor could they. Procedurally, the Applicants cannot make a new argument in their reply brief. *See* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 6.38, p. 511 (10th ed. 2013) ("[T]he only type of reply brief that the Court considers legitimate or justified is one that is 'addressed to new points raised in the brief in opposition.' This is designed to prevent mere reiteration or enlargement of arguments made in the petition.") (quoting S. Ct. R. 15.6).

Even without this procedural obstacle, the Applicants cannot show likely irreparable harm because (a) *this* Administration has already enhanced vetting procedures *without* a travel or refugee ban; and (b) Applicants do not assert that continuing to apply *this Administration's own enhanced* vetting procedures to nationals of the six countries and refugees is *currently* inadequate. Section 5(a) of the Amended Order has *never* been enjoined. It provides:

> "The Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence s*hall implement a program*, as part of the process for adjudications, *to identify individuals* who seek to enter the United States on a fraudulent basis, *who support terrorism, violent extremism, acts of violence toward any group or class of people within the United States, or who present a risk*

> *of causing harm subsequent to their entry.* This program shall include the development of a *uniform baseline for screening and vetting standards and procedures, such as in-person interviews*; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; *amended application forms that include questions aimed at identifying* fraudulent answers and *malicious intent*; a mechanism to ensure that applicants are who they claim to be; *a mechanism to assess whether applicants may commit, aid, or support any kind of violent, criminal, or terrorist acts after entering the United States;* and *any other appropriate means for ensuring the proper collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility or grounds for the denial of other immigration benefits.*"

82 Fed. Reg. 13209 at § 5(a) (emphasis added).

In the subsequent three months, the Administration has "implement[ed]" the additional screening and vetting that Section 5(a) of the Amended Order required for all potential entrants, including nationals of the six countries and refugees. For example, on March 17, 2017, the State Department adopted enhanced visa screening by requiring longer interviews, more detailed questions by consular officials, and a "mandatory social media review" by the "Fraud Prevention Unit" if an "applicant may have ties to ISIS or other terrorist organizations or has ever been present in an ISIS-controlled territory . . . ."

Hawaii II, ECF No. 114-2, at *12, 56, 70 (State Dep't Cable 25814 ¶¶ 8, 10, 13, *available at* http://bit.ly/2o0wBqt).[3] On April 27, 2017, the Administration issued a new rule that adds a question to the Electronic Visa Update System, asking for information associated with an applicant's "online presence," meaning information related to his or her "Provider/Platform"; "social media identifier"; and "contact information." 82 Fed. Reg. 19380. On April 29, 2017, President Trump wrote that his Administration was "substantially improv[ing] vetting and screening." *See* Donald J. Trump, *President Trump: In my first 100 days, I kept my promise to Americans*, WASH. POST (Apr. 29, 2017), http://wapo.st/2s7BmUg ("Visa processes *are being reformed* to substantially improve vetting and screening . . . .") (emphasis added). On June 1, 2017, the State Department promulgated a new supplemental questionnaire for visa applicants that asks applicants to list (1) every place they have lived, worked, and traveled internationally—including how such travel was funded—for the past fifteen years; (2) every passport they have ever held, including number and country of issuance; (3) names and birth dates of all siblings, children, spouses, and partners; and (4) every social media handle, phone number, and email address they have used for the past five years. U.S. Dep't of State, *Supplemental Questions for Visa Applicants* (2017), http://bit.ly/2qBSrpv.

Indeed, on June 5, 2017, the President tweeted, "[i]n any event"—meaning without the travel and refugee

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3. Even before this Administration, *every* refugee was vetted by *numerous* federal agencies and the office of the United Nations High Commissioner for Refugees. *See Hawaii II*, ECF No. 155 at 9-12 (Br. of Amicus Curiae HIAS).

bans—"we are EXTREME VETTING people coming into the U.S. in order to help keep our country safe." Donald J. Trump (@realDonaldTrump), TWITTER (Jun. 5. 2017 3:44 a.m.), http://bit.ly/2rtbEIK (capitalization in original). The next day, the White House Press Secretary stated that the President's tweets are "considered official statements by the President of the United States." Aric Jenkins, *Sean Spicer Says President Trump Considers His Tweets 'Official' White House Statements*, TIME (Jun. 6, 2017), http://ti.me/2rT57aO.[4]

Statistics confirm the President's "official statements." For example, in the first six months of the 2017 fiscal year, searches of electronic devices of international travelers arriving at U.S. airports increased 36.5 percent. U.S. Customs and Border Prot., *CBP Releases Statistics on Electronic Device Searches* (2017), http://bit.ly/2oyyLAu. And, to the point, comparing April 2017 to the 2016 monthly averages, non-immigrant visa issuances were down 15% among all countries, 20% among Muslim-majority countries, almost 30% among Arab countries, and 55% among the six countries designated by Section 1(e) of the Amended Order. Nahal Toosi and Ted Hesson, *Visas to Muslim-majority countries down 20 percent*, POLITICO (May 25, 2017 10:28 EDT), http://politi.co/2r0XBHQ.

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4. Thus, the President's "official statements" confirm that a March 10, 2017 letter to him from more than 130 generals and national security experts from across the political spectrum—including two former Secretaries of the Department of Homeland Security—was correct. That letter explained that the United States has been and would be able to "implement any necessary [vetting] enhancements without a counterproductive ban or suspension on entry of nationals of particular countries or religions." *Hawaii I*, ECF No. 201-5 (Nat'l Security Experts' March 10, 2017 Letter to President Trump, *available at* http://politi.co/2klc2FU).

That this Administration already has enhanced vetting substantially shows that no stay is needed to prevent a likely irreparable injury. The Government repeatedly has represented that the "short" and "temporary" travel and refugee bans would end when this Administration established "current screening and vetting procedures [that] are adequate to detect terrorists seeking to infiltrate this Nation." Application at 8, 30; *Hawaii II*, ECF No. 23 at 1-2, 10, 12, 36, 43 (Appellants' Br.). But the Applicants now seek a stay without even asserting that *their own substantially enhanced* "current screening and vetting procedures" are inadequate for nationals of the six countries or refugees. Accordingly, there is no basis to find that irreparable injury will likely result absent a stay from this Court.

The Amended Order certainly provides no such basis. It was issued before this Administration's current enhanced vetting was in place. When issued, it cited only one example that involved a native of any of the six countries. "[I]n October 2014, a native of Somalia *who had been brought to the United States as a child refugee* and later *became a naturalized United States citizen* was sentenced to 30 years in prison for attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon." 82 Fed. Reg. 13209 at § 1(h) (emphasis added). The Amended Order, however, could not claim that this United States national was radicalized before he came to this country as a "child refugee." So this lone instance cannot support a suggestion that vetting ever was inadequate, much less that it is now.

The conclusory March 6, 2017 letter from the Attorney General and Secretary of DHS, cited by Application at 8, also does not support any likely harm absent a stay. That letter has become stale. It did not and could not purport to address whether this Administration's own substantially improved vetting procedures, put in place *after* the March 6, 2017 letter, are currently adequate for nationals of the six countries and refugees. Even when issued, that letter was not joined by the then-senior national security officials with the most anti-terrorism experience—namely, then-FBI Director James Comey and NSA Director Admiral Michael Rogers. Moreover, the letter does not contradict the President's repeated admissions that the Amended Order is merely a "watered-down version of the first order." *Hawaii I*, ECF No. 239-1 (Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak'*, TIME (Mar. 16, 2017), http://ti.me/2o09ixe); *see also* Donald J. Trump, TWITTER (Jun. 5, 2017 3:29 a.m.), http://bit.ly/2rDbHzY ("The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C."). That first executive order was issued "*without* consulting the relevant national security agencies." *IRAP II*, 2017 WL 2273306 at *20 (emphasis added).

Further, before the Amended Order, the Government's vetting review had produced "internal reports" that "contradict th[e] national security rationale" for the travel ban. *Id.* A DHS internal report, made public on February 25, 2017, concluded that being a national from one of the six countries is an "unlikely indicator" of terrorism threats against the United States. *Hawaii I*, ECF No. 64-10 (DHS Rep't, *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States, available at*

http://bit.ly/2mh0GVh). A second DHS report, dated March 1, 2017, concluded that "most foreign-born, U.S.-based violent extremists [are] likely radicalized several years *after* their entry to the United States." *Hawaii I*, ECF No. 64-11 (DHS Report, *Most Foreign-born, US-based Violent Extremists Radicalized after Entering Homeland; Opportunities for Tailored CVE Programs Exist* (March 1, 2017), *available at* http://bit.ly/2qVWCYi) (emphasis added). Internal FBI data also "undermine[d] a key premise of the travel ban" because that data revealed that "most" foreign nationals who have posed a risk to the United States came from "countries unaffected" by the Amended Order. *See* Devlin Barrett, *Internal Trump Administration Data Undercuts Travel Ban*, WASH. POST (Mar. 16, 2017), *available at* http://wapo.st/2nVszOX. In sum, a "significant amount of internal government data" demonstrated the travel ban "is not likely to be effective in curbing the threat of terrorism in the United States." *Id.* Nothing in the Applications supports the contrary.

The President's recent attempts to bootstrap the need for the travel ban to terrorism in London flop. Within an hour of the June 3, 2017 terror attack in London, the President tweeted that it showed "[w]e need the Travel Ban." Donald J. Trump (@realDonaldTrump), TWITTER (Jun. 3, 2017 4:17 p.m.), http://bit.ly/2rzYrwd; *see also* Donald J. Trump (@realDonaldTrump), TWITTER (Jun. 5, 2017 3:25 a.m.), http://bit.ly/2rtmled ("People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!") (capitalization in original). He added the next morning: "We must stop being politically correct." Donald J. Trump (@realDonaldTrump), TWITTER (Jun. 4, 2017 4:19 a.m.), http://bit.ly/2qQRn1e.

But when President Trump tweeted, he could not have had any factual basis to believe that any of the three London attackers would be covered by the Amended Order's bans. Indeed, facts subsequently learned indicate that the Amended Order's bans would not have applied to the attackers. One was a British national; another an Italian national; and the third was a national of Morocco and perhaps also Libya. Paul Cruickshank, *Who was London attacker Khuram Butt?*, CNN (Jun. 6, 2017 2:42 a.m. ET), http://cnn.it/2qWaHd8 (describing first attacker as "British national born in Pakistan"); Martin Robinson, *Second London Bridge terrorist was a Moroccan-Libyan pastry chef living in Dublin with an Irish ID*, DAILYMAIL.COM (Jun. 5, 2017 10:44 a.m. EDT, updated Jun. 5, 2017 4:52 p.m. EDT), http://dailym.ai/2rMQTX8 ("Rachid Redouane is believed to have been born in Morocco but moved to Dublin around five years ago after marrying a Scottish woman . . . [and] was also carrying an Irish identity card when he was shot dead by police . . . ."); Robert Booth, Vikram Dodd, Lorenzo Tondo, and Stephanie Kirchgaessner, *London Bridge: third attacker named as Youssef Zaghba*, THE GUARDIAN (Jun. 6, 2017 3:57 p.m. EDT), http://bit.ly/2qWwO3v (describing third terrorist Youssef Zaghba as a "Moroccan-born Italian [national]"). The Amended Order does not apply to British, Italian, or Moroccan nationals, or dual nationals who travel under their status as a national of a non-designated country. Amended Order §§ 3(b)(iii). Moreover, none of the London attackers had been screened by, and passed, the equivalent of what President Trump has described as his Administration's current "EXTREME VETTING." *Supra*, at 12-14.

The President's tweets *as President* about the London attacks thus confirm that the basis for the Amended Order's bans has never been about the adequacy of vetting procedures for nationals of the six countries or refugees. Rather, the President's recent, blunt tweets inescapably show that the basis underlying his bans always has been the assumption that Muslims have a proclivity to commit terrorism.

There is no legally cognizable harm from an injunction against government action that is based on a stereotype about adherents to a particular religion. *See IRAP II*, 2017 WL 2273306 at *46 (Wynn., J. concurring). Just as this Court should never resurrect *Korematsu v. United States*, 323 U.S. 214 (1944), this Court should never grant any form of relief—much less grant discretionary equitable relief causing immediate chaos and havoc—in deference to executive action based on a religious stereotype. *Cf. id.* at 235 (Murphy, J., dissenting) (rejecting executive action based on "assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy . . ."); *id.* at 240 (rejecting "infer[ence] that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group").

CONCLUSION

The Applications for Stay should be denied.

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Respectfully submitted,

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